

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

J. M. LEITER and FLOYD J. CAMPBELL,
Plaintiffs in Error,
vs.
THOMAS S. POINDEXTER,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the United States District
Court of the District of Idaho, Central Division.

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C. J. ORLAND,
Attorney for Defendant in Error.

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ARGUMENT.

This action was brought by the plaintiffs, upon a certain written instrument, who are now plaintiffs in error, the instrument is shown upon pages 198-9 of transcript.

The instrument is claimed to be a negotiable promissory note, to have been made by the defendant and one Henry Stroh, who is not made a party herein, and that the plaintiffs in error are bona fide purchasers of the instrument, in due course and before the maturity thereof.

To the complaint of the plaintiffs in error, the defendant answered, and deny the making or executing of the instrument and every material allegation set forth in the complaint of the plaintiff in error. (Transcript commencing at page 7).

For a separate defense the defendant answering further, (Commencing at page 10 of transcript) alleges: that the transaction out of which the claimed and pretended promissory note was obtained, was in regard to a stallion, which the payees thereof, Ruby & Co. undertook to sell, and perhaps did sell to Henry Stroh, one of the parties to the instrument, to the extent of six-sevenths of the interest in said stallion, the other one-seventh, was in reality a gift to the defendant herein, but evidently done for the purpose of obtaining his name to the instrument, which was successful on the part of the agent of Ruby & Co. (Transcript from page 36 to 43).

The defendant further answered, that the stallion was diseased and worthless for breeding purposes or any other; that the signature of the defendant was obtained by misrepresentation and fraud; that the defendant never signed, or intended to sign a promissory note; that the instrument was changed and altered into a promissory note after the signature of the defendant was obtained thereto; that the instrument when signed by the defendant, as well as Henry Stroh purported to be a Stockholders' Purchasing Contract, required by Ruby & Co. to be signed by purchasers of horses and authorizing, by the order therein contained, the delivery of the horse to one of the purchasers; that the instrument, after the signatures of the defendant and Stroh were obtained thereto, was changed into the instrument that appears in the transcript, heretofore referred to on page 198 and 199 of the transcript.

The defendant also assails, by his answer, the bonafides of the sale and transfer of the instrument by the A. C. Ruby Co. to the plaintiffs in error.

The evidence on most of the questions involved, were to some extent conflicting, and have been determined, by the jury, in the defendant's favor, by its verdict, which is general, (Transcript page 20).

There are two main defenses in the case, both of which were fairly submitted to the jury, by the court.

The first of which is, whether the defendant signed the instrument in the condition in which it appeared, when introduced in evidence, or whether it

had been changed and altered from an innocent agreement of purchase of the stallion mentioned therein, and an order for the delivery of the horse to one of the parties whose name appears upon the instrument, and designated as "Stockholders' Purchasing Contract" to a promissory note.

This question was fairly submitted to the jury, by the court, by its instructions, (Transcript pages 151 to 153).

This alone was decisive of the case, by the verdict of the jury, in the defendant's favor, the jury, in effect said, that there was no promissory, that the defendant never made to the A. C. Ruby Co. such a note, and that no such promissory note existed, as to this defendant, and that all that the defendant signed was the agreement of purchase and an order for the delivery of the stallion.

There is no conflict in the evidence, that the defendant was not indebted to A. C. Ruby Co., the payee of the instrument, in any amount whatever, for any interest in the stallion or otherwise.

There being no part of the sale price of the stallion owing by the defendant to the A. C. Ruby Co. There was no debt owing by the defendant or for which he was or became liable, except, that, which might arise by reason of liability, on account of the instrument in controversy, and there was no reason for his signing such an instrument as this now purports to be, and charge himself with liability for a debt which he did not owe, and which he had refused to incur, (Transcript pages 37 and 48).

If the defendant did not sign the instrument in the form in which it appeared in court, but that part which constitutes the instrument a note was written in and filled out after the signature of the defendant was obtained thereto, then there was no liability of the defendant.

The jury have so determined by their verdict, carefully submitted to them by the court, and to which part of the instructions no exception has been taken.

The second question, is as to the condition of the stallion, with reference to his soundness and ability to breed successfully, and that question was also submitted to the jury, by the court, and determined by their verdict as was the other.

The main contention of the plaintiff in error, is, as to the negotiable character of the instrument in controversy, plaintiff's Exhibit "A", (Transcript page 163), to this question is directed their motion for a directed verdict (Transcript page 148), and the exceptions to the instructions of the court, to the jury, as well rulings upon the evidence.

The court held the instrument to be non-negotiable, (Transcript page 34).

That it contains three obligations or elements of agreement.

One is an agreement to purchase the stallion named in the instrument, the second an agreement or order that the stallion might be delivered by the seller, the A. C. Ruby Co. and payee of the instrument, to

any one of the parties to the instrument, and third an agreement to pay a sum of money.

The instrument was evidently prepared and used by the A. C. Ruby Co., for the purpose of deception in the obtaining of signatures thereto, by the unwary and unsuspecting, it can well have no other object, it is worse than senseless, except for such purpose.

To construe such an instrument as a negotiable promissory note, is but to assist the unscrupulous in perpetrating frauds, in obtaining the signatures of people to similar instruments, which eventually develop into negotiable promissory notes, either with or without the innocent looking appendage, which may be separated from that part which constitutes the liability.

That from the evidence of the defendant, he had no occasion, necessity or design to sign a note, (Transcript pages 40 to 42) also evidence of Henry Stroh, (Transcript pages 82 and 83).

Various have been the instruments devised, for the purpose of procuring signatures thereto, for some apparently innocent looking purpose or object, which thereafter, by a species of legerdemain, develop into an entirely different instrument than that which the parties intended or supposed that they were signing.

Instruments of this character, should, so far as the law will permit, be construed by the courts to be non-negotiable, in order that the innocent and deceived signer may be protected, and that no one could

become a bona fide holder thereof, within the meaning of the law governing negotiable instruments, and more especially should such be the ruling of the courts, when that part of the instrument which might and is likely to deceive, is attached to the instrument, as the attention of the prospective purchaser is directly called to that part which is or might be used for deceptive purposes, and which should put such purchaser upon his guard, and to investigate and discover why, a promissory note should be commenced and headed with a deceptive title, and a title that did not express only a portion of what the instrument contained, and from such title the main part of the instrument, and that which created the liability which he was purchasing, being omitted.

In this case, the attention of a purchaser of a note of this size, could hardly be presumed not to see at a glance the heading of the instrument, to-wit: "STOCKHOLDERS' PURCHASING CONTRACT" in large and prominent letters, this of itself should be sufficient to advise a prospective purchaser of such paper to investigate the reason of such a title being affixed to such an instrument, and to warn him and cause inquiry to be made as to the conditions under which such an instrument was obtained, it should be sufficient to cause any person to suspect that there might be some infirmity in the instrument, and that it was not intended by the maker that it was other than what it purported, by its title to be, and not an agreement for the payment of money and was

never by the maker intended to be or become such an instrument.

While it is probably true, that the title of an instrument is not controlling as to the contents of the instrument and as to what it actually may be, yet it should be taken into consideration, and in this case the plaintiffs in error are claiming something by the instrument, which by its title, it is not, except in part, and of which they had notice at the time the same was transferred to them.

This instrument was made in the State of Washington and payable in the State of Oregon, the universal negotiable instrument law is in force in both states and was at the time the instrument was executed, no question of which law governs is necessary under such conditions.

The "Universal Negotiable Instrument Law," provides, as follows:

"An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable."

Plaintiff's exhibit "A" page 163 of transcript, contains a promise to purchase the stallion, named therein and also an order for its delivery, by the seller, to one of the parties whose name is signed to the instrument, also a promise, (as it now appears) to pay a sum of money in installments.

By the negotiable instrument law, certain provisions are permitted to be included, without affecting

the negotiability of the note, but an agreement for the purchase of property and an order to deliver the purchased property to one of the parties thereto, are not among the provisions authorized by the law.

The object and theory of the Universal Negotiable Instrument law, was, beside providing a uniform law throughout the United States, governing negotiable instrument, to make a fixed, predetermined and stable rule, as to what may and what may not be included in a negotiable note, and what will destroy its negotiable character.

The fifth section of the original act, (Lord's Oregon Laws, section 5838) a part of which has been heretofore quoted, provides as follows:

“An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

First. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

Second. Authorizes a confession of judgment if the instrument be not paid at maturity; or

Third. Waives the benefit of any law intended for the advantage or protection of the obligor; or

Fourth. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.”

This act especially provides that no order or promise shall be included in instruments controlled by this law, and if there be included in any such instrument, any order or promise not included within the four subdivisions of the section providing for exceptions from the general rule laid down, such order or promise will render the instrument non-negotiable.

The agreement of purchase the stallion and the order for his delivery, certainly can not be included in a negotiable instrument, under the provision authorizing the sale of collaterals; confession of judgment; waiver of any law of benefit to the obligor, or that gives the holder an election to require something to be done in lieu of the payment of money.

The word "promise" as used in the Negotiable Instrument Law is equivalent and practically synonymous with contract, covenant or agreement and is evidently used in that sense.

One of the definitions of the word "promise" as given by Webster is "In law, a declaration, verbal or written, made by one person to another, for a good or valuable consideration, in the nature of a covenant, by which the promiser binds himself, and, as the case may be, his legal representative, to do or forbear some act, and gives to the promisee a legal right to demand and enforce a fulfillment."

The instrument in controversy, has, as one of the parts of its provisions a promise, agreement or covenant to purchase the horse therein named, also an order for the delivery of the horse to one of the parties;

these provisions are both excluded by the provisions of the law, and are in violation of its strict requirements, and render the instrument non-negotiable.

Independent of the provisions of the Universal Negotiable Instrument Law, and in accordance with the usual rules governing such instruments, promissory notes in the form of the one in controversy or with similiar provisions incorporated in them, have been, by the great weight of authority, if not universally held by the courts, to be non-negotiable.

Killam v. Schoeps, 26 Kas. 310.

Rochford v. McGee, 61 L. R. A. 335.

Stevens v. Johnson, 9 N. W. 677.

Lincoln Nat'l Bank v. Perry, 66 Fed. 887.

Kimpton v. Studebaker, 14 Idaho 558.

Halladay State Bank v. Hoffman, 116 Pac. 239.

The plaintiff's in error have cited certain authorities, some of which I will refer to, the first case is that of Ireland v. Sharpenberg, 54 Wash. 558, 103 Pac. 801.

While the note sued upon in this case seems to be worded the same as is the one in controversy, except necessary changes, the question of its negotiability, on account of its form was not raised in the case, or passed upon by the court.

There was no question but that the note was complete when signed, and in the same condition that it was when offered in evidence as to the part which constitutes the promissory note.

The portion of the instrument, constituting the purchasing part of it and for the delivery of the horse, had been separated from the note part of the instrument, and the contention and decision in the case, was in regard to such separation of the two parts of the agreement.

The case does not support the position of the plaintiff in error, and does not pass upon the negotiability of the instrument, with reference to its form, in accordance with the provisions of the negotiable instrument law, and especially the fifth section thereof, the question might well have been raised, but it seems not to have been considered.

Another case cited by the plaintiff in error, is, *Chicago Railway Equipment Co. v. Merchants National Bank*, 136 U. S. 260, 34 (L. ed.) 349.

The decision in that case was based, by the Supreme Court, upon the peculiar statutes of the State of Illinois, and in following the construction, by the courts of that state, of such statute.

It was decided in 1890, under a very different statute from the present negotiable instrument law, governing this instrument.

It is based upon the question of retention of title, of personal property, in the payee, or as security for the payment of the instrument; under the law merchant, this has been a much mooted question, upon which the courts have been, prior to the adoption of the negotiable instrument law, hopelessly divided.

In Vol. 3, *Ruling Case Law*, it is said:

“The Negotiable Instruments Act is not a new law. It is, with few exceptions, merely the codification of the rules of the law merchant that previously were in force and effect by virtue of judicial pronouncement or legislative enactment.

While it does not cover the whole field of negotiable instrument law, it is decisive as to all matters comprehended within its terms. Where the act speaks, it controls; and prior conflicting adjudications must be held for naught; but where the statute is silent, resort must be had to the principles of the law merchant or the common law regulating commercial paper.”

This act, has, by its positive terms, precluded the including of matter not strictly applicable to commercial paper, except in the few instances, which are specifically provided, and by the rule of construction, nothing should be included in the paper, not specially permitted, and everything not specified should be rigidly excluded therefrom.

The law is intended to create uniformity in such instruments, and if one agreement not provided for may be included, then another may be, and there would be no end to confusion, and what might be included and what might not be included, would soon become as uncertain, as it was before the passage of this law, as to what might or might not effect the negotiable character of the instrument, as to the transferree in due course.

The main question in the case of the Chicago Rail-

way Equipment Co. v. Merchants National Bank, *supra*. has been directly passed upon, by at least one court, with direct reference to the negotiable instrument law, and holding such a provision in a promissory note, renders it non-negotiable.

Kimpton v. Studebaker, 14 Idaho 558.

Another case cited by the plaintiff in error, is United States National Bank v. Floss, 38 Ore. 68, 62 Pac. 751.

Two questions were involved in this case, the first, that the non-payment of interest due, is not such a dishonor of the note as will render it non-negotiable, so as to admit of defenses, as against a purchaser in due course.

Second, that knowledge by the indorsee, at time of transfer, of the consideration for which the note was given, will not prevent a recovery upon a note, or admit of defenses against an indorsee in due course, unless the indorsee also knows that there has been a breach of the contract out of which the consideration for the note arose.

Neither of these questions are involved in the case at bar, and falls far short of being an authority in support of the proposition of the plaintiff in error, that the conditions of the note in controversy is negotiable, within the rule of protection to an indorsee in due course.

The instrument in controversy as a negotiable instrument, under the negotiable instrument law, does

not comply with the restrictions of the law with reference to what may be contained in a negotiable instrument.

The writ of error should be denied, and the judgment of the District Court affirmed.

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